The case of *Howe* v. *Smith* [1] may be cited as supporting the statement of law just made. There Cotton L.J., stated, quoting from the case of *Collins* v. *Stimson*:

"What he says is this, 'According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit.' That was the principle of his decision."

It is true that in that case Cotton L.J. also said

"I do not say that in all cases where this Court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprove him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract. In those circumstances, in my opinion, the rule is correctly laid down in Lord Justice James's judgment (of course the case there was stronger than the one we have to deal with) where the representatives of the purchaser had neither in law nor in equity the right to the return of the deposit."

but here it was for the respondent to prove that the appellant repudiated the contract, and he failed to do so or to prove that he himself did not repudiate it; in fact the magistrate could well have found that it was he who repudiated the contract.

Again in the case of *Stockloser* v. *Johnson* [2] Denning L.J. made the following statement

"But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause), then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. That is, I think, shown clearly by the decision of the Privy Council in *Steedman* v. *Drinkle*, where the Board consisted of a strong three, Viscount Haldane, Lord Parker and Lord Summer."

The facts of that case were considerably different from this one, and as far as the reference is to money expressly paid as a deposit I think those words were "obiter dicta". Further Bowen L.J. in giving his judgment in the same case did not agree with them. They cannot, I consider, be considered as deciding the law on the point, and even if they do, I am quite satisfied that this is not a case in which any relief from forfeiture (if such a relief can be given) should be given.

This appeal is allowed, and the decision of the learned trial magistrate is reversed. In the effect, the respondent/plaintiff's original claim is dismissed.

The appellant is awarded $20.00 costs of this appeal.

Appeal allowed.

OTHMAN MAT v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Wee Chong Jin C.J. (Singapore) & Chua J.) February 24, 1964]

[Singapore — Federal Court Criminal Appeal No. 12 of 1963]

Penal Code, s. 300, Exception 1—Murder—Defence of grave and sudden provocation—Whether adequately put —Whether misdirection—Defence of diminished responsibility.

The appellant was found guilty by the jury of the murder of one MT and sentenced to death. At the trial there were two versions of the whole incident. The appellant's version briefly was that he had some trouble with the deceased's wife as to the use of the bathroom and that that afternoon the deceased challenged the appellant to come out, pulled the appellant out of the room where he was playing cards, insulted him and then aimed a kick at his testicles and then punched him on the eye causing the appellant "to see stars" and the deceased then rushed at him with both hands raised when the appellant retreated to his room. The appellant also called Doctor W, the Deputy Medical Superintendant of Woodbridge Hospital who stated that he examined the appellant on June 24, 1963 while he was awaiting trial and found that he was not suffering from any form of mental illness. On July 3, 1963 Doctor W again examined him and found that he was suffering from schizophrenia which according to the doctor was possibly precipitated by the mental strain of awaiting trial. When the doctor again examined him on August 20, 1963 the apppellant was found then to be of sound mind and capable of making his defence. The doctor also stated that the half inch laceration suffered by the appellant over the right eyebrow over the frontal bone could cause cerebral concussion and confusion resulting in the impairment of the higher mental functions like his sense of ethics, prudence, self restraint and judgment.

On appeal against conviction and sentence it was argued that the learned trial Judge misdirected the jury in dealing with the evidence which could constitute grave and sudden provocation, or alternatively that he did not give an adequate direction as to the evidence available which could constitute grave and sudden provocation. The second ground of appeal was diminished responsibility.

Held: (1) the defence of provocation was sufficiently put and left for the consideration of the jury and there was nothing in the summing up which was inconsistent with the Privy Council decisions in *Chan Kau* v. *R.* [1] or *Lee Chun-Chuen* v. *R.* [2];

(2) on the evidence of the medical witness and other evidence at the trial there was no such unchallenged evidence that the appellant was suffering from abnormality of mind as substantially impaired his mental responsibility for his acts that it can be rightly said that the verdict of murder was unreasonable and cannot be supported by evidence.

Cases referred to:—

(1) *Chan Kau* v. *R.* [1955] A.C. 206.

(2) *Lee Chun-Chuen* v. *R.* [1963] A.C. 220.

(3) *Holmes* v. *Director of Public Prosecutions* [1946] A.C. 588.

(4) *Ho Chun Yuen* v. *R.* [1961] Hk. L.R. 433.

FEDERAL COURT.

David Marshall for the appellant.

Tan Boon Teik (Solicitor-General) for the respondent.

Wee Chong Jin C.J. (read by **Chua J.**): In this case the appellant was found guilty by the verdict of a jury of the murder of Mohamed Tasir bin Abdullah and sentenced to death. He appealed against his conviction and at the conclusion of the appeal we dismissed it. We now give our reasons for dismissing the appeal.

At the trial the charge against the appellant was that he and Alias bin Ismail on or about the 28th day of April 1963, at about 7.30 p.m. in front of No. 125 Jalan Kayu, Singapore committed murder by causing the death of Mohamed Tasir bin Abdullah. The jury found Alias bin Ismail not guilty but found the appellant guilty.

The medical evidence at the trial showed that the deceased sustained eight injuries. One of these was an incised wound 6 inches long running from the nose to the right of the head and to the top of the forehead. The weapon that caused this injury cut clean through the bone of the nose and the bone of the forehead and cut through the underlying brain to a depth of one inch. There were two other head wounds which went through the underlying bone of the skull.

The principal witness for the prosecution was Maznah, the wife of the deceased. Her evidence was that on the day in question the deceased went to work at about 6 a.m. At about 8 a.m. while she was washing clothes in a common bathroom, the appellant spoke angrily to her as she had made him wait for his bath. After he had taken his bath he told Maznah to tell her husband to challenge him to a fight. When her husband returned home from work in the afternoon Maznah told him about the incident with the appellant over the bathroom and what the appellant had said to her.

About two hours after the deceased had been told by his wife of the bathroom incident, he went to look for the appellant who was playing cards with the 2nd accused in the room of a neighbour, Khamis. The appellant came out of the room where he was playing cards in response to a call by the deceased and outside this room some words were exchanged between the deceased and the appellant, with the 2nd accused present, and thereupon a fight ensued in a passage-way between two rows of rooms, between the deceased on the one side and the appellant and the 2nd accused on the other. Blows were exchanged with fists until eventually the deceased fell on the ground as the result of a push by the 2nd accused who whereupon sat on his abdomen and prevented him from getting up. The appellant went into his own room, came out with a parang, and while the deceased was still on the ground, struck the deceased three blows with it. Maznah on seeing this rushed up to the appellant to try and help her husband but was struck a blow by the appellant with the parang resulting in her losing consciousness for a while. When she recovered consciousness she saw her husband get up, sway from side to side, and fall down in front of the appellant's room.

Two other witnesses Supardi and his wife also gave evidence that they saw the appellant strike the deceased with a parang while the 2nd accused was sitting on the deceased's abdomen.

The appellant in his defence gave the following version of the whole incident. In the morning when Maznah was in the bathroom washing clothes he asked her to let him have the use of the bathroom to take his bath but she carried on with her washing for ten more minutes before vacating the bathroom. When she came out of the bathroom he said nothing to her but she told him that he was not the only one to pay rent and used the expression "Babi" (meaning swine) at him and also said "when my husband returns I will tell him and he can teach you". In the afternoon from 1.30 p.m. to about 6.30 p.m. he played cards with the 2nd accused, Supardi and another person Khamis under a tree outside Khamis' room. Then they adjourned into Khamis' room to continue their game of cards. At about 7.25 p.m. the 2nd accused stopped playing and left the room and five minutes later the deceased called to him from outside to come out. The appellant took no heed of this call as well as a second call and then the deceased pulled him outside into the passage-way and insulted him by saying "Have you balls or not. I have been waiting for you for 3 to 4 hours outside". Then the deceased aimed a kick at his testicles but the blow landed on his knee cap. The deceased then struck him near his left eye causing him to see stars. Then the appellant fought back and three persons, Supardi and two others, joined the deceased in the fight against him. The 2nd accused at this stage came on the scene again and tried to stop the fight but the fight went on. After the appellant had received several blows he, to use his own words, did not know himself. He ran back to his room but the deceased followed and rushed at him with raised hands. He then picked up a parang and wielded it in order to drive the deceased out. In cross-examination he said that when the deceased was running out of his room on seeing him holding a parang he struck the deceased with it.

At the trial the appellant called one witness Dr. Winslow, the Deputy Medical Superintendent of Woodbridge Hospital. Dr. Winslow gave evidence that he examined the appellant on 24th June 1963, while he was awaiting trial, and found that he was not suffering from any form of

mental illness. On 3rd July 1963 Dr. Winslow again examined him and found that he was suffering from schizophrenia which the witness defined as a disease of the mind which causes disorganisation of the mental processes. Dr. Winslow said he did not know what had caused this condition in the appellant but added that it was possible that the mental strain of awaiting trial precipitated the schizophrenia. He was again examined by Dr. Winslow on 20th August who found that he was then of sound mind and capable of making his defence. Dr. Winslow said the half inch laceration over the right eyebrow over the frontal bone which the appellant suffered during the fight could cause cerebral concussion. He was also of the opinion that a person suffering from mild cerebral concussion would be likely to be either dazed or he would be unconscious for one or two seconds without his knowledge or the knowledge of others and when asked whether such a person would be in a state of mental confusion his reply was that he would be liable to suffer from both concussion and confusion resulting in the impairment of the higher mental functions like his sense of ethics, prudence, self-restraint and judgment. Finally when asked what effect mild concussion could cause on the mental faculties of a person prone to schizophrenia his reply was that the general experience is that those who have a tendency to mental illness also have a greater tendency to post-concussional confusion as compared with those who have no tendency to mental illness.

Counsel for the appellant relied mainly on the two following grounds of appeal.

1. "The learned trial Judge misdirected the jury

(a) in dealing with evidence which could constitute grave and sudden provocation within the provisions of *Exception* 1 to section 300 of the Penal Code.

Alternatively —

(b) in that he did not give adequate direction to the jury as to the evidence available which could constitute grave and sudden provocation."

2. "The learned trial Judge did not give adequate guidance to the jury on the issue of diminished responsibility and in particular did not invite their attention to the fact that the appellant's evidence as to his state of mind at the killing was supported by Dr. Winslow's evidence on the effect of a blow to the eye of a person prone to schizophrenia and there was no contrary evidence."

There were several other grounds of appeal but these were lightly touched upon by counsel for the appellant and in our opinion quite properly so, as being without substance.

First we will deal with the ground of appeal that relates to grave and sudden provocation.

Exception 1 to section 300 of the Penal Code (Cap. 119) provides that

"Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident."

First, it was submitted by counsel for the appellant that the learned trial Judge in effect in his summing up withdrew from the consideration of the jury any consideration of the defence evidence of grave and sudden provocation in that he limited the material the jury had to consider to a few blows with fists during a fight which was the prosecution evidence and made no reference during that portion of his summing up on grave and sudden provocation to the defence evidence that the deceased challenged the appellant to come out, pulled the appellant out of the room where he was playing cards, insulted him and then aimed a kick at the appellant's testicles and then punched him on the eye causing him to "see stars" as well as the evidence that the deceased rushed at him with both hands raised when he had retreated to his own room.

It is clear from the brief outline of the evidence we have set out that the evidence for the prosecution and the evidence for the defence were completely different with regard to the events immediately before and during the fatal fight. The two different versions were both put to the jury by the learned trial Judge in a careful and lengthy summing up when he dealt with all the evidence led at the trial in relation to the murder aspect of the charge.

Immediately after that part of the summing up the learned trial Judge dealt with the law on grave and sudden provocation. Without repeating all the evidence, he directed the jury in substance to consider the whole evidence in deciding whether, if they were satisfied beyond reasonable doubt that the prosecution had proved its case on culpable homicide, the circumstances of the killing were such as to reduce the offence to culpable homicide not amounting to murder by reason of grave and sudden provocation.

Counsel for the appellant relied on the Privy Council case of *Chan Kau* v. *The Queen.*[1] In that case the defence of provocation was withdrawn by the trial Judge from the jury and it was in the light of this express withdrawal that Lord Tucker in delivering their Lordships reasons for allowing the appeal said at page 212

"....withdrawal of the issue of provocation must be judged on a view of the evidence most favourable to the accused"

and earlier on at page 211, after outlining the defence sworn to by the accused which differed materially from a statement made by him to the police, said

"on a proper direction they might accordingly have altogether rejected the appellant's sworn testimony, but he was entitled to have his defence as given in evidence fairly put before the jury, and it was the Judge's duty to direct the jury on the law applicable to the case on that basis."

We see nothing in the summing up inconsistent with *Chan Kau's* case nor was it inconsistent with another Privy Council case of *Lee*

Chun-Chuen v. *The Queen* [2] which was also relied on. In both these Privy Council cases their Lordships were merely reaffirming the statement of the law on provocation contained in the judgment of Viscount Simon in *Holmes* v. *Director of Public Prosecutions* [3] at 597 as to the right test to apply when the trial Judge is considering whether or not to leave provocation to the jury.

In *Chan Kau's* case as we have earlier stated the question before the Privy Council was whether the trial Judge had wrongly withdrawn the defence of provocation from the jury. In *Lee Chun-Chuen's* case the Privy Council was considering whether the Court of Appeal of Hongkong had understood or applied the correct principles in applying the proviso to section 82 of the Criminal Procedure Ordinance of Hongkong which is identical with the proviso in section 4(1) of the English Criminal Appeal Act and the proviso in section 6(1) of the Singapore Court of Criminal Appeal Ordinance where although the trial Judge had left the issue of provocation to the jury, he had misdirected them that if the provocation caused in the mind of the accused an actual intention to kill or cause grievous bodily harm, then the killing would be murder. The Privy Council held this direction in the circumstances of that case amounted to telling the jury that they must find murder or nothing and so in effect excluding the issue of provocation. On the facts of that case the Privy Council came to the conclusion that although the misdirection amounted to a serious misdirection in law on provocation no miscarriage of justice could have been caused because there was no sufficient material on that issue to go to the jury.

In the present case the complaint was not that the issue of grave and sudden provocation was wrongly withdrawn from the jury and in our opinion the defence on that issue was sufficiently put and left for the consideration of the jury.

It was next contended by counsel for the appellant that the learned trial Judge misdirected the jury in so directing them as to restrict their consideration on the same issue to evidence of provocation emanating only from the deceased. Counsel's contention is that on the true construction of *Exception* 1 to section 300 provocation coming from the deceased includes provocation coming from another person with whom he is identified so that it can be said he adopted it.

Counsel referred us to the Hongkong case of *Ho Chun Yuen* v. *The Queen* [4] where Hogan C.J. delivering the judgment of the Hongkong Supreme Court, after considering a number of English and Privy Council cases and a Canadian case, which were also cited before us, said:—

"With such guidance as one can get from these cases and having regard to the essential element in provocation as defined in *Holmes* v. *D.P.P.*, it seems reasonable to interpret any limitation of provocation to acts by the deceased, as including acts of others so closely associated with the deceased and the deceased's actions that the deceased can be considered, in effect, to have adopted and joined in those acts".

In the case before us counsel for the appellant submitted that the deceased's actions on the evening of the 28th April showed that he had adopted and joined in the provocative acts of his wife earlier that day relating to the use of the common bathroom. Having regard however to the appellant's own evidence that he was not angry when the deceased's wife called him swine and said when her husband returned she would tell her husband and he would teach the appellant, and having regard to the long lapse of time between the bathroom incident and the start of the deceased's incident with the appellant we are of the opinion, assuming the law on this point to be as stated by Hogan C.J. in *Ho Chun Yuen* v. *The Queen*, that there was no misdirection by the learned trial Judge.

The criminal law of Hongkong is however different from ours in that ours is codified. English law is again different from ours for the same reason and in England there are conflicting decisions as to whether or not provocation must be limited to acts of the deceased.

It is unnecessary in the present case for us to state the law on this point in general terms and we accordingly do not propose to do so.

The second main ground of appeal is on diminished responsibility. On diminished responsibility the learned trial Judge after reading to the jury the relevant provisions in the Penal Code said:—

"Now, to bring himself within this exception, and of course I am referring only to accused No. 1 when I am dealing with this exception, accused No. 1 must show that he was suffering from an abnormality of mind and that such abnormality of mind arose from a condition of arrested or retarded development of mind or any inherent causes or was induced by disease or injury and was such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing of the deceased. The word 'injury' is there, members of the jury, and you have heard that due to the punch over one of his eyes he became dazed, but I will deal shortly with the evidence of Dr. Winslow on this point. I must now deal with the phrase 'abnormality of mind'. This means a state of mind so different from that of the ordinary human beings that reasonable men would term it abnormal. It is wide enough to cover a man's activities in all its aspects, not only perception of physical acts and matters and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with rational judgment. The expression 'mental responsibility for his acts' points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will power to control his physical acts. Now, whether accused No. 1 was at the time of the killing suffering from any abnormality of mind in the particular sense which I have indicated is

a question for you, members of the jury. On this question medical evidence is important and you are entitled to take into consideration the medical evidence and the other evidence including the acts or statements of accused No. 1 and his demeanour. The question which you must decide is this: Was the abnormality of mind such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing? This is a question of degree and essentially one for you, members of the jury."

The learned trial Judge then dealt at length with the evidence of Dr. Winslow and drew the jury's attention to the injury to the appellant's eye, and then left the issue for the jury's determination.

It was contended before us that the evidence was all one way, namely Dr. Winslow's uncontradicted evidence and the appellant's evidence as to his own state of mind and that, in the circumstances the jury's failure to return a verdict of culpable homicide not amounting to murder was unreasonable.

While it is clear law that the jury must act on evidence, it is also clear law that while diminished responsibility depends in the main on medical questions and the evidence of medical experts there are involved in a defence based on diminished responsibility matters of fact on which a jury is just as fit to express their view of the facts as is a doctor, and that the decision is for the jury and not for the doctors.

The evidence of Dr. Winslow we have already sufficiently outlined. It showed that when he first examined the appellant on the 24th June 1963 i.e. approximately two months after the alleged murder he found the appellant not suffering from any form of mental illness. About 10 days later Dr. Winslow examined the appellant again and formed the opinion that he was then suffering from schizophrenia, caused he knew not why but possibly because of the mental strain of awaiting trial. About 7 weeks later, on again examining the appellant Dr. Winslow formed the opinion that he was of sound mind and capable of making his defence on the charge of murder. At the trial Dr. Winslow's attention was drawn to the eye injury which the appellant suffered during the fight with the deceased and was questioned as to the effect on a person receiving such an injury. His replies were to the effect that such a person might suffer a mild cerebral concussion rendering him either dazed or unconscious for one or two seconds and might also suffer confusion resulting in the impairment of the higher mental functions. He further said that the general experience is that those who have a tendency to mental illness also have a greater tendency to post-concussion confusion as compared with those who have no tendency to mental illness.

On the evidence of Dr. Winslow and the other evidence at the trial we are of the opinion that there was no such unchallenged evidence that the appellant was suffering from abnormality of mind as substantially impaired his mental responsibility for his acts in doing the killing of the deceased that it can be rightly said that the verdict of murder was unreasonable or cannot be supported by the evidence.

In the result we dismissed the appeal.

Appeal dismissed.

KESAR SINGH v. SEPANG OMNIBUS CO. LTD.

[O.C.J. (Ismail Khan J.) February 24, 1964]

[Seremban — Originating Motion No. 25 of 1962]

Company—Private company—Shares—Sale of—Refusal of directors to register transfer—Articles conferring absolute and uncontrolled discretion on directors to refuse—Whether refusal bona fide in interests of company.

Where directors of a company are given by the Articles of Association an absolute and uncontrolled discretion with regard to registering a transfer of shares the only limitation on the directors' discretion is that it should be exercised *bona fide* in the interests of the company.

Once the directors have stated on oath that they have exercised their discretion in the interests of the company it must be assumed that they have so exercised their discretion unless the contrary is established by cross-examination of the deponents or by establishing a substantive case showing that the discretion has been wrongly exercised, though in some cases this may appear from the affidavit.

Case referred to:—

(1) *Re Smith & Fawcett, Ltd.*, [1942] 1 All E.R. 542; [1942] Ch. 304.

MOTION.

Morris Edgar for the applicant.

Edgar Joseph Jr. for the respondent.

Ismail Khan J.: This is an application by way of motion on the part of the applicant that the register of members of the respondent company may be rectified by striking out the name of K. V. Nadarajah therefrom as the holder of 1,500 shares of the said company and also by striking out the name of Too Koke Wee therefrom as the holder of 100 shares of the said company, and by inserting in lieu thereof the name of the applicant as the holder of 1,600 shares.

It is agreed that only the application in respect of the 1,500 shares should be dealt with.

According to his affidavit in support of the application, the applicant obtained a transfer of 1,500 shares in the company (a private company) on the 21st September, 1961, from Nadarajah the shareholder. On 25th September, 1961, he wrote to the secretary of the company informing him of the transfer and requesting him to register the said shares in his name. On the 24th November, 1961, he was informed that the directors had rejected the said transfer and had refused the registration thereof. The applicant alleges that